

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FREDERICK FAGAL, JR. :
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vs : 3:14-CV-2404
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:
MARYWOOD UNIVERSITY :

BEFORE: THE HONORABLE A. RICHARD CAPUTO
PLACE: COURTROOM NO. 3
PROCEEDINGS: NONJURY TRIAL
DATE: WEDNESDAY, APRIL 25, 2018

APPEARANCES:

For the Plaintiff:

JONATHAN ZACHARY COHEN, ESQ.
JONATHAN Z. COHEN LTD.
175 STRAFFORD AVENUE
SUITE 1 # 212
WAYNE, PA 19087-3340

For the Defendant:

KATHLEEN A. MCGINLEY, ESQ.
DONALD E. ENGLISH, JR., ESQ.
JACKSON LEWIS, PC
2800 QUARRY LAKE DRIVE
SUITE 200
BALTIMORE, MD 21209

STEPHANIE JILL PEET, ESQ.
JACKSON LEWIS, LLP
THREE PARKWAY
1601 CHERRY STREET
SUITE 1350
PHILADELPHIA, PA 19103

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INDEX TO WITNESSES

FOR PLAINTIFF: DIRECT CROSS REDIRECT RECROSS

FREDERICK F. FAGAL, JR.
6

1 MR. COHEN: Good morning, Your Honor.

2 THE COURT: Okay. Mr. Cohen.

3 MR. COHEN: Yes. Your Honor, I did ask defendant's
4 counsel to agree to a motion to admit several exhibits, more
5 than several to be honest. They said no. But I realize that
6 four of them don't need any witness to identify them. They are
7 self-authenticating. For the others, there's no rule that
8 prohibits me from recalling my client. Your Honor has full
9 discretion over the mode and order of calling witnesses. I
10 haven't rested my case.

11 The only downside is that the case will run ten
12 minutes later. I'm not going to ask him any substantive
13 questions. I'm just asking ask him to identify some exhibits
14 and that's -- that's my position on this, Your Honor.

15 THE COURT: So I am not sure I understand what you're
16 telling me. You want to put your client back on the stand to
17 identify certain exhibits?

18 MR. COHEN: Yes, Your Honor.

19 THE COURT: Okay. What's the problem?

20 MS. PEET: The problem is some of the documents that
21 he wants admitted into evidence you already ruled are
22 inadmissible. Three of them are subsequent remedial measures
23 inadmissible impermissible pursuant to rule 407, the same
24 document he tried to use yesterday. He's trying to admit his
25 expert's report. As, you know, the expert testified here at

1 trial, the report is not admissible. I would like to go over
2 each exhibit that he wants to introduce because I don't believe
3 they are appropriate.

4 MR. COHEN: Okay.

5 THE COURT: Is that right?

6 MR. COHEN: First, some of those that counsel
7 mentioned I wasn't going to have my client authenticate. Some
8 of them I am just going to let go. I was only going to call my
9 client to authenticate the exhibits that he can authenticate.
10 Those don't include the ones objected to --

11 THE COURT: Something has been objected to and not
12 admissible, I can't imagine that he's going to try to do that.

13 MS. PEET: In fairness, Your Honor, last night we got
14 an e-mail around midnight asking us to agree to admit those
15 documents into evidence today. That's what I am responding to.
16 I haven't received any further communication.

17 MR. COHEN: Look, they pretty much made it clear
18 yesterday they weren't going to allow anything. I tried again.
19 They said no. They provided no reason. I just think that --

20 THE COURT: You're confusing me. Trying to put in,
21 for example, subsequent immediate remedial measures.

22 MR. COHEN: Yes, that's not true.

23 THE COURT: I am confused. Do you have a problem
24 with him putting his client witness on the witness stand?

25 MR. ENGLISH: For the limited purpose of identifying

1 documents, I do. He got his shot. I mean --

2 THE COURT: Is that the best you can do for me?

3 MR. ENGLISH: Your Honor, I understand if he wants to
4 put him on to identify these exhibits, then --

5 THE COURT: Yeah. Recall your witness. Doctor,
6 you're still under oath.

7 FREDERICK F. FAGAL, JR., was recalled.

8 MR. COHEN: I do apologize for the short delay, Your
9 Honor. Brian, pull up Plaintiff's Exhibit 17, please. Fred,
10 do you recognize this document?

11 MR. ENGLISH: Your Honor, before we get into the
12 document, I object to this document. This is a newspaper
13 article that is not evidence, and it's just talking about how
14 these videos in other contexts are a. Joke and it has nothing
15 to do with this case because this isn't discussing how these
16 videos are a joke when an employer -- when an employee makes a
17 video to humiliate his employer by depicting them as Hitler.

18 THE COURT: What's the purpose of this?

19 MR. COHEN: Your Honor, not to show -- not to admit
20 them for the truth of what they are saying but simply to prove
21 the public exposure of this type of parody, you know, to show
22 that these were well known by the public. It wasn't something
23 out of the blue that my client just created for the first time.
24 It's just to show how publically exposed these Downfall
25 parodies are.

1 THE COURT: You can have him identify it.

2 MR. COHEN: Okay.

3 THE COURT: All right. When it comes time to ask to
4 for it to be admitted, we will hash that out.

5 DIRECT EXAMINATION

6 BY MR. COHEN:

7 Q. Fred, what is this document?

8 A. Well, this would be a B. B. C. News article. Looks like
9 the link is down below. I read the article on my computer, and
10 it explains the popularity of Downfall videos and parodies.

11 MR. COHEN: Your Honor, I move to admit Plaintiff's
12 Exhibit 17 into evidence.

13 MR. ENGLISH: Your Honor, for the same reason we will
14 object.

15 THE COURT: I understand your point. How is it
16 relevant? It shows the popularity, right? Is that what you
17 say --

18 MR. COHEN: The public knowledge of it, public
19 exposure of it.

20 THE COURT: You had a number of people from Marywood
21 on the witness stand. You never asked anyone if they were
22 familiar with it. What difference does it make what someone in
23 New York City thought about that? How is it germane to this
24 case?

25 MR. COHEN: I am not showing it for what someone said

1 in New York City --

2 THE COURT: You're said there was public awareness of
3 if. You're suggesting that the people in the Marywood
4 community would have been aware of it. You could have
5 presented evidence of that. I am not going to allow it.

6 MR. COHEN: Brian, pull up exhibit plaintiff 46.

7 BY MR. COHEN:

8 Q. Do you recognize this document?

9 A. Yes, I do.

10 Q. What is it?

11 A. It's part of the Marywood policies and procedures manual
12 regarding violent acts and threats.

13 Q. And what's the date on it? Can you turn the page all the
14 way to the end?

15 A. Last revision in the history says it was revised 4/29/11,
16 April 29th, 2011.

17 MR. COHEN: Your Honor, I move to have this exhibit
18 admitted.

19 MR. ENGLISH: No objection, Your Honor.

20 THE COURT: It will be admitted.

21 MR. COHEN: Brian, pull up exhibit plaintiff 59,
22 please.

23 BY MR. COHEN:

24 Q. Fred, do you recognize this document?

25 A. Yes, I've seen this before. It's a letter from you to

1 Marywood attorney at the time, Mr. Anthony, about President
2 Munley's letter saying I was terminated and lost my tenure.

3 MR. COHEN: Your Honor, I move to have plaintiff's
4 trial exhibit 59 admitted.

5 MR. ENGLISH: Your Honor, I will restate my
6 objections to the other letters that, you know, this is really
7 testimony from the lawyer and not from Dr. Fagal. With that in
8 mind, I understand you've allowed in similar letters from Mr.
9 Cohen.

10 THE COURT: I will admit this.

11 MR. ENGLISH: Okay.

12 MR. COHEN: Brian, could you pull up exhibit P. 90?

13 BY MR. COHEN:

14 Q. Fred, do you recognize this document?

15 A. Yes, I do.

16 Q. And could you identify it, please?

17 A. Pardon me?

18 Q. Could you identify it, please?

19 A. Yes, it's a letter from attorney Anthony to you on
20 February 28, 2012.

21 Q. Okay. And --

22 MR. COHEN: Your Honor, I move to have plaintiff's
23 trial exhibit 90 moved into evidence.

24 MR. ENGLISH: No objection, Your Honor.

25 THE COURT: Admitted.

1 MR. COHEN: Brian, pull up Plaintiff's Exhibit 130.

2 BY MR. COHEN:

3 Q. Fred, could you identify this document?

4 A. Yes, it's the letter I wrote November 18th, 2016 to the
5 economic search committee at Cazenovia College as part of the
6 job application.

7 MR. COHEN: Your Honor, I move to have plaintiff's
8 trial exhibit 130 admitted.

9 MR. ENGLISH: No objection, Your Honor.

10 THE COURT: It's admitted.

11 MR. COHEN: Brian, pull up Plaintiff's Exhibit 135.

12 BY MR. COHEN:

13 Q. Fred, do you recognize this document?

14 A. Yes, it's an e-mail from me to the economic search
15 committee at Cazenovia College in Cazenovia, New York. It
16 says, attached please find my letter of application for the
17 tenure track economics job.

18 MR. COHEN: Your Honor, I move to have plaintiff's
19 trial exhibit 135 admitted.

20 MR. ENGLISH: No objection, Your Honor.

21 THE COURT: Admitted.

22 MR. COHEN: Brian, pull up Plaintiff's Exhibit 144.

23 BY MR. COHEN:

24 Q. Fred, do you recognize this document?

25 A. Yes, I do.

1 Q. What is this?

2 A. Well, it's an e-mail to me from State University of New
3 York, Oswego, New York dated June 20th, 2017, and it's a
4 follow-up letter regarding my application for the position
5 assistant visiting professor of economics at SUNY Oswego.

6 MR. COHEN: Your Honor, I plaintiff to have
7 plaintiff's trial exhibit 144 admitted.

8 MR. ENGLISH: No objection, Your Honor.

9 THE COURT: Admitted.

10 MR. COHEN: Brian, pull up joint exhibit 5, please.

11 BY MR. COHEN:

12 Q. Fred, do you recognize this document?

13 A. Yes, I do.

14 Q. And what is this?

15 A. This is a -- part of the policies and procedures manual
16 relating to tenure at Marywood University.

17 Q. Turn to the last page, Brian. And what's the date on
18 this, Fred?

19 A. Latest revision date is 12/09/11, which would be December
20 9th, 2011.

21 MR. COHEN: Your Honor, I move to have joint exhibit
22 5 admitted.

23 MR. ENGLISH: No objection, Your Honor.

24 THE COURT: Admitted.

25 MR. COHEN: Last one is joint exhibit 40, please.

1 BY MR. COHEN:

2 Q. Fred, do you recognize this document?

3 A. Yes, this is a -- from the Chronicle of Higher Education,
4 the job search e-mails I would get, and this is related to a
5 visiting assistant professor of economics, Oswego, April 28th,
6 2017.

7 MR. COHEN: Your Honor, I move to have joint exhibit
8 40 admitted into evidence.

9 MR. ENGLISH: No objection, Your Honor.

10 THE COURT: Admitted. Any questions?

11 MR. ENGLISH: No, Your Honor.

12 THE COURT: You can step down. Do you have all your
13 exhibits squared away?

14 MR. COHEN: Yes, I do. Plaintiff rests.

15 THE COURT: All right. Thank you, Your Honor.

16 MR. ENGLISH: Your Honor, are we going to do
17 stipulations?

18 MR. COHEN: Yes, are you talking about the undisputed
19 facts that we have --

20 MR. ENGLISH: Yes. We worked it out last night with
21 the undisputed facts rather. Than read them in, I think we
22 have something ready to submit, or we will have something.

23 MR. COHEN: I didn't get back -- could I simply file
24 it with the Court? It's just a statement of undisputed facts.
25 It's an amended version of what was submitted with the pretrial

1 memo.

2 THE COURT: All right.

3 MR. COHEN: Thank you, Your Honor.

4 MR. ENGLISH: Rather than read them, I think we
5 agreed to submit them. I think we agree on everything, okay.
6 Just to be clear, Your Honor, I think we came to an agreement
7 on the answer. And so we ended up stipulating to what he
8 wanted us to stipulate so those two exhibits, they'll need to
9 be admitted.

10 THE COURT: Okay. What are the admissions?

11 MR. COHEN: One was that Marywood removed some of the
12 posters that were hung, and the other was that the posters had
13 been approved by Marywood. That's all.

14 THE COURT: Okay.

15 MS. MCGINLEY: Your Honor, we are going to make a
16 motion for a directed verdict.

17 THE COURT: I understand.

18 MS. MCGINLEY: Judgment should be entered for
19 defendant now because Dr. Fagal has not proven a breach of the
20 tenure agreement by Marywood. The testimony established was to
21 the contrary that Dr. Fagal materially breached the tenure
22 agreement and because of that material breach he cannot insist
23 on further performance of the contract by Marywood. In your
24 opinion denying the motion for summary judgment, you said you
25 needed to hear from the parties about their expectations of the

1 contract, and you did yesterday and on Monday, particularly
2 from Dr. Fagal and also from Sister Munley in her deposition
3 transcript.

4 She expected and as did other -- as did Marywood, the
5 university, a contributing professor who would uphold its core
6 values and not discriminate and harass other colleagues. That
7 expectation was clearly communicated to Dr. Fagal in the
8 policies that he admits he received, that is the professional
9 ethics policy, academic freedom policy and the tenure policy
10 and the civil rights policy. Five tenured professors testified
11 in plaintiff's case as did Sister Munley that his actions in
12 posting that video were outrageous, unbelievable and completely
13 out of line for a tenured professor.

14 He could not unpost or undistribute the videos. He
15 showed uncompromised, unrepairable judgment that could not be
16 undone. Marywood cannot be compensated by him for that loss of
17 a tenured professor. Dr. Fagal's testimony was clear that in
18 the January 23rd meeting even today he shows no remorse. He
19 doesn't believe what he did was wrong and he still believes
20 that it was a joke even after we heard from Dr. Levine that it
21 wasn't a joke to hear those things about his family and
22 himself.

23 There's no likelihood now or then that Dr. Fagal was
24 going to repair or remedy the breach even if it could be done.
25 And further, his testimony and his e-mails from before and

1 after posting the videos demonstrate his bad faith in doing so.
2 He intended to shame, embarrass and cause pain to Marywood.

3 For these reasons he materially breached the
4 agreement. Marywood did not waive that breach. It notified
5 him twice by Sister Munley and then by a letter to his attorney
6 that he materially breached, and Marywood didn't owe him
7 anything. Even though -- so waiver is an intentional act. And
8 by notifying him of his breaches, it didn't waive that material
9 breach by continuing to perform its end of the bargain, which
10 was just to end the tenure agreement.

11 It did not continue to accept teaching performance
12 from him. He was immediately suspended, and the Eastern
13 District of Pennsylvania has held that it did not find a waiver
14 where a party informed the breaching party over that the breach
15 was a material breach but kept performing its end if only to
16 mitigate its own damages. Marywood cannot be expected to stop
17 performance to prove a material breach. That would be a an
18 unreasonable catch 22. Aside from Dr. Fagal's material breach,
19 the evidence before the Court is not -- is that Marywood
20 complied with its policies.

21 The progressive discipline policy did not require Dr.
22 Levine to notify Dr. Fagal of his suspension. The policy says
23 that a faculty member may be notified by the V. P. of academic
24 affairs, not that it's required. He -- Dr. Levine and Sister
25 Munley testified that Dr. Levine was a victim of the videos and

1 it would be inappropriate to involve him in Dr. Fagal's
2 suspension and discipline. Suspension of Dr. Fagal was proper
3 because the university found he posed an immediate threat of
4 harm. The Court is not deciding whether Marywood made the
5 right decision in finding immediate harm or made the right
6 decision in terminating him. The Court is deciding whether it
7 followed its policies in executing those decisions. As Sister
8 Munley testified as did Dr. Levine, Helen Bittel, Edward
9 O'Brien and Erin Sadlack, the university found he was a threat
10 of immediate to Marywood's community and his coworkers,
11 particularly Dr. Levine.

12 Title 7 requires the university to take immediate
13 prompt, remedial action to end harassing conduct of coworkers,
14 and Marywood did that by suspending Dr. Fagal. Even so, the
15 policy does not state that suspension is appropriate only if
16 there's a threat of immediate harm, and the policy certainly
17 doesn't state that immediate harm is physical. The progressive
18 discipline policy is discretionary for serious violations. The
19 language of the policy makes that clear.

20 The university regards disciplinary actions as
21 corrective and not punitive. The policy recognizes personal
22 and professional problems that may be rectified in an informal
23 educational process as well as serious violations of
24 professional responsibilities implicating possible
25 recommendation for suspension or dismissal making clear that

1 there are two tracks and that suspension is not a prerequisite
2 to dismiss.

3 In interpreting the language of a contract, the Court
4 attempts to ascertain the intent of the parties. In his
5 e-mails prior to release of the videos Dr. Fagal did not say,
6 well, they're only going to give me an oral warning or only a
7 written warning. He said, they may terminate me and they'll
8 have to form committees and have hearings. Those are processes
9 of termination. He understood for serious violations dismissal
10 was the appropriate action.

11 Dr. Fagal's suspension was reviewed several times by
12 the grievance committee as testified by Dr. Sadlack, by the ad
13 hoc committee as part of the termination and then separately as
14 on July 13th. And each time the suspension was upheld. The
15 April effective date of the termination was correct. Dr. Fagal
16 admits he did not timely authorize the release of his personal
17 information to the committee. He had ten days to do so under
18 the progressive discipline policy.

19 He testified he never signed the agreement, and his
20 lawyer notified Marywood twice that he was not going to sign
21 it. When he did finally authorize the release on March 29th,
22 two months after he received the second recommendation of
23 termination, he was still granted the ad hoc committee review.
24 It doesn't matter that review came after the finalization of
25 his termination because that review is only a recommendation to

1 the final decision maker, who is Sister Munley. And there was
2 no indication as testified by Ed O'Brien that Dr. -- that
3 Sister Munley was not going to take their recommendation into
4 effect.

5 She did not have to convene that committee, but she
6 did. For these reasons, Marywood did not breach the agreement.
7 Even if this Court finds that there's some technical breach,
8 that is all it is. Dr. Fagal received the benefit of his
9 bargain. He knew he can be terminated for his conduct. He
10 received actual notice of his suspension and termination. He
11 received multiple reviews of his suspension and his termination
12 and the opportunity to raise his defense to two committees.
13 The order of the review as I said it's immaterial. The ad hoc
14 committee is advisory only.

15 If a breach is found, the evidence before the Court
16 is that Dr. Fagal has not reasonably and diligently searched
17 for a job. He admits to applying to only three jobs in six
18 years he that was qualified for more jobs during that time. He
19 retired after being separated from Marywood, and he should not
20 be rewarded for that. Thank you.

21 THE COURT: Thank you.

22 MR. COHEN: Your Honor, I am responding to
23 plaintiff's motion for directed verdict. I am going to address
24 each of the arguments in approximately the order they were
25 given. The first argument that I heard is that Marywood did

1 not waive a material breach. This is an issue that's been
2 present in this case from the beginning, and Marywood has never
3 really had a response to it.

4 The law is clear, and it's been clear for many years
5 and that is that a party alleging that it could suspend
6 performance under contract because another party materially
7 breached that contract cannot then continue performance without
8 waiving the breach. Those cases are Radisson Design
9 Management, Inc., versus Cummins. That's 2011 West Law 818
10 668, WESTERN district of Pennsylvania, Fuller Company versus
11 Brown Minneapolis Tank and Fabricating Company, 678 F. Supp.
12 506, Eastern District of Pennsylvania, Gillard versus Martin,
13 which is a Pennsylvania Superior Court case, that's 13 A3.d
14 482.

15 And Gillard has the clearest explanation of this
16 concept, and it is citing the well known Williston treatise on
17 contracts. When one party commits a material breach of
18 contract, the other party has a choice between two inconsistent
19 rights. He or she can either elect to allege a total breach,
20 terminate the contract and bring an objection or instead elect
21 the keep the contract in force, declare the default, only a
22 partial breach and recover those damages caused by that partial
23 breach.

24 But the non-breaching party by electing to continue
25 receiving benefits pursuant to the agreement cannot then refuse

1 to perform his or her end of the bargain. Now, in all of the
2 cases I have looked at involving this concept, I never -- I
3 never seen a waiver so clear. And by the way, the concept is
4 not just called waiver. Waiver does -- it sort of depends on
5 the intent of the party, but the other analogous concept is
6 called election of remedies which does not require us to prove
7 the intent of the defendant.

8 And to listen to the steps taken after they gave
9 notice of material breach, it is just to acknowledge that there
10 was a waiver. For example, after defendant's counsel advised
11 of a material breach, the next thing that happened is that they
12 offered to convene an ad hoc committee to review President
13 Munley's recommendation for Fred's termination. They convened
14 a faculty grievance committee to adjudicate Fred's grievance.
15 And then I think we heard testimony from Ms. -- Dr. Sadlack
16 yesterday that there were multiple meetings involving three
17 professors of the faculty grievance committee.

18 Then they permitted Fred to select a faculty member
19 for the ad hoc committee, Dr. O'Brien. The ad hoc committee
20 was convened, multiple meetings involving three professors all
21 acting as if the contract is in force. They permitted at ad
22 hoc committee to deliberate over the course of several months
23 and to reach a decision. If you recall, the initial notice
24 that Professor Fagal received that he had materially breached
25 which was from defendant's counsel came I think February 8th or

1 9th, 2012. I believe at least five months passed of all these
2 procedures and involving multiple professors, tons of man
3 hours, all acting as if the contract is still in force.

4 Then the obvious thing -- by the way, while they are
5 doing this, while they are giving him these procedures, they're
6 continuing to explicitly reference, well, we are doing this
7 pursuant to the progressive discipline policy. I asked Dr.
8 Sadlack, did you think you were following the faculty
9 grievances and appeals policy. She said yes. They are
10 continuing to follow to perform under the contract that their
11 own attorney said was no longer in force.

12 The most obvious thing they simply continued to pay
13 him through August of 2012. I can't envision a greater waiver
14 than this or election of remedies. The case that they cite out
15 of the Eastern District of Pennsylvania, unpublished case,
16 actually decided under Delaware law, I think that their
17 argument is it says a party shouldn't have to guess whether the
18 breach is material or non-material and risk litigating this.

19 And I think the case simply doesn't say that. I
20 think they are misinterpreting it. The Pennsylvania jury
21 instructions on this concept says that in the -- in the
22 materiality section if the party alleging material breach ends
23 up being wrong and the breach is proved to be non-material,
24 that's on them. They have to take that risk.

25 Not only do we have this concept that has been

1 enforced for many, many years, this is a sophisticated party
2 and while this was going on they were represented by skilled
3 counsel. They knew what they were doing. They did it anyway.
4 And now they want would have their cake and eat it, too. They
5 want to say, oh, no, there was never any contract because we
6 terminated it. But by the way, we followed it anyway. You
7 simply can't have both of those under the law. I haven't heard
8 defendant offer a single case on point case about this.

9 As far as I'm concerned, after their case in chief, I
10 could make a motion for judgment that their material breach
11 argument should be precluded because it's so obviously waived.
12 So that's the first argument.

13 By the way, this issue was disposed of very early on
14 day one of this case, and, in fact, defendant's counsel in her
15 opening statement says for some reason the evidence will show
16 that Sister Munley put Dr. Fagal on notice of his material
17 breach, but, nonetheless, allowed him to have six different
18 tenured faculty review her recommendations and decisions. Game
19 over. They admitted it from the first step.

20 Okay. Now, secondly, I was wondering why this
21 argument of material breach has bothered me so much from
22 beginning of this case. I finally figured it out last night.
23 This case can only be brought because of a seminal Pennsylvania
24 Supreme Court case called Murphy versus Duquesne University.
25 It's from 2001. And what that case was about was a tenured

1 professor at a Pennsylvania -- private Pennsylvania university,
2 just like this one. And basically I think the professor -- his
3 tenure was terminated and his employment was terminated. I
4 think his case involved sexual harassment or assault.

5 That professor went through the Pennsylvania courts,
6 went all the way to the Pennsylvania Supreme Court all the way
7 he's arguing what I did wasn't bad enough, substantively it
8 wasn't bad enough to merit a termination of my tenure. And all
9 the while the university is saying, these decisions made by
10 universities, they are meant to be final, they're not meant to
11 have Court review of educational decisions. The only thing you
12 should be able to prove as a breach of contract is a breach of
13 procedure. So you can't argue in a case that your termination
14 -- you were terminated for something just not bad enough. You
15 have to argue as a procedural breach.

16 So at the beginning of this case Marywood filed a
17 motion to dismiss under 12(b)(6). I think they argued, well,
18 they're not -- if you look at the contract they can't really be
19 arguing a procedural breach because that's not what the
20 contract says. So they must implyably be arguing that what
21 Fred did was simply not bad enough, and you're not allowed to
22 do that. Now we've come full circle, okay. Now, for the past
23 two days we have been arguing -- we have flipped Murphy on its
24 head and because they're arguing that the procedures don't
25 apply anymore because the material breach, guess what we have

1 been arguing for the past two days? Exactly what Murphy
2 prohibits, how bad was the breach. If a university could
3 suspend its disciplinary rules simply on the argument, well,
4 the breach was so bad we didn't have to abide by the rules,
5 then the university in Murphy could have done the same thing.

6 They could have said, you know what, Murphy, get off
7 campus, we are terminating this contract and those disciplinary
8 rules don't apply. Any university in this situation could just
9 simply say, you know what, we think your breach was so bad, our
10 own disciplinary rules don't apply, get off campus, we dare you
11 to sue. They have flipped Murphy on its head. I doubt if the
12 Your Honor reads Murphy again that the concept of material
13 breach is even available in this case.

14 Next I will move on to assuming they haven't waived
15 the material breach and assuming it's even available to that
16 defense under Murphy, was it a material breach, and we would
17 argue that it's non-material. And simply put, this is a very
18 subjective determination under the restatement. I believe
19 there are five or six elements to consider, and it's an issue
20 of fact. And basically what the Pennsylvania courts have said
21 is that materiality requires a, quote, substantial showing of
22 several factors including, quote, the extent to which the
23 injured party will be deprived of the benefit which he
24 reasonably expected, quote, the extent to which the party
25 failing to perform or to offer to perform will suffer

1 forfeiture and, quote, the likelihood that the party failing to
2 perform or offered to perform will cure his failure, end of
3 quote.

4 Those are three of the considerations, okay. Let's
5 look at the first one. The extent to which the injured party
6 will be deprived of the benefit which he reasonably expected.
7 My client was not hired to exhibit Marywood's core values every
8 single day. He was hired to teach, and he did that for many
9 years. There's never been any argument that he -- you know,
10 took a month off and neglected his students. He drove two
11 hours every day to teach these students. Okay. The faculty
12 manual says the primary duty of a faculty member is to teach.
13 That's not surprising. It's a university.

14 Secondly, it's not even clear whether some of these
15 core values that Marywood is citing are even part of the
16 contract. They are mentioned in the contract. But they are
17 mentioned in aspirational ways, goals and objectives. Not
18 binding requirements. Second, the extent to which the party
19 offered suffer forfeiture. That's exactly what happened here,
20 forfeiture, job over . That the likelihood that the party
21 failed to perform or offered to perform will cure his failure.
22 Again at no point was he even asked to cure his failure. We
23 did that voluntarily, we took down the video voluntarily.

24 Marywood represents in its faculty handbook that its
25 professors have the, quote, rights and obligations of other

1 citizens, end of quote, and reminds them that, quote, as
2 citizens engaged in the profession that depends upon freedom
3 for its health and integrity they have a, quote, particular
4 obligation to promote conditions of free inquiry, end of quote.

5 Marywood claims a commitment to, quote, a tradition
6 grounded on individual rights, a tradition that, quote, posits
7 open discussion and unrestricted exchange of ideas.

8 Professors, quote, maintain their right to criticize. As I am
9 reading these, I am starting to realize maybe they breached
10 their contract. They are trying to suppress free speech when
11 here they are saying you have to encourage it.

12 THE COURT: Do you think a university can put limits
13 on the speech of a professor?

14 MR. COHEN: Absolutely, Your Honor, absolutely can.

15 THE COURT: Isn't that what we are talking about
16 here?

17 MR. COHEN: Yes, the problem is they're not exactly
18 clear what the limits are because the contract is quite frankly
19 a little chaotic. It says you -- it says open discussion and
20 unrestricted exchange of ideas and conflicting parts. It's not
21 clear what is allowed and not. It seems that the line -- the
22 speech no longer becomes free at this university as when the
23 president becomes offended. That's the line. The university
24 has a liberal disciplinary policy making even violent acts and
25 threats and thefts against the institution and carrying deadly

1 weapons, quote, subject to university disciplinary policies and
2 procedures or the progressive discipline policy. What does
3 that tell you? You know, they've been arguing that this
4 progressive discipline policy can't cover everything, it wasn't
5 intended it. It can't cover, for example, the person that
6 comes onto campus that is physically threatening. Well,
7 strangely, it does seem to cover that. It's in the contract.
8 They've wrote it. It contemplates even violence.

9 To argue they can throw their whole contract away
10 because of a parody, it simply doesn't make sense. Here we
11 have a professor in his 25th year of service to Marywood and
12 18th year of tenure, terminated for publishing a video parody
13 of frankly reprehensible behavior by the university. They
14 claim -- they encourage him to spread free speech there. He
15 has someone come to class. They approved the posters. Then
16 they remove them. They don't give him notice. You know,
17 there's 46 posters. He's paid money for this. He spent a lot
18 of time. He asked for an apology. He doesn't get it. I can
19 understand why he was angry .

20 The issue was easily recognizable satire. Apparently
21 no member of the Marywood community filed a civil rights
22 complaint against Fred. Nor did anyone ask the obvious, which
23 was simply to remove the video, which he did anyway. There's
24 no objective evidence that Marywood's reputation suffered
25 because of the video. There's no allegation that Fred

1 abandoned his primary role of teacher or teaching skills
2 suffered in any way. And given those factors, we think it's a
3 stretch to argue that plaintiff's video parody was so
4 substantial a breach as to permit Marywood to bypass its own
5 disciplinary rules.

6 Next Marywood argues that this contract they cite
7 never existed anymore, they didn't breach it anyway. And they
8 have their own interpretation of the contract. And they have
9 always argued progressive discipline is not required in all
10 cases, and they raised that argument at the beginning of the
11 case on their motion under 12(b)(6), and this Court said, well,
12 we looked at the contract because it was attached to the
13 complaint and it does appear to say, well, what plaintiff says
14 it says, that a professor that has alleged to have committed
15 misconduct is entitled to warnings and various progressive
16 discipline before he is kicked off campus and terminated.
17 That's not what happened here.

18 THE COURT: So you're getting to -- in their view of
19 things, you get to publish one video like this with immunity?

20 MR. COHEN: In whose view?

21 THE COURT: In their view. In your view of their
22 rules. How do you warn -- how is a warning applicable here?

23 MR. COHEN: Well, Your Honor, it's --

24 THE COURT: I can see the -- I can see the
25 progressive discipline being applied to someone that brings a

1 gun on campus. You can remove that person or remove the gun.
2 No harm, no foul. Once this video -- forgetting whether the
3 video is offensive or not -- they think it's offensive. Once
4 it's done, how do you engage in progressive discipline?

5 MR. COHEN: Well, if it you interpret the contract
6 literally, which I think we argue you have to, they would
7 simply have to say, take it down, this is your oral warning,
8 don't do it again. If you do it again, you're going to a
9 written warning. Does it sound a little ridiculous, it does.
10 My client didn't write the contract. They did. They did.
11 And, you know, because they wrote the contract it must be --
12 any ambiguities or uncertainties must be resolved against them.

13 THE COURT: Even though something would on its face
14 not be -- not be applicable?

15 MR. COHEN: Your Honor, I think I just argued I think
16 it would be applicable. Here they would simply have to say,
17 you posted this video, we think it's offensive, take it down,
18 this is your oral warning, next one will be a written warning.

19 THE COURT: All right, okay.

20 MR. COHEN: There's another argument that defendant
21 has been making, and it's a fairly new argument, and that
22 argument is that not only are we allowed to do what we did, we
23 had to do what we did because this could have created a hostile
24 work environment, we had a legal obligation to do what we did.
25 And you heard several witnesses come up referencing legal

1 phrases that they never said before, okay, that sounded great
2 like hostile work environment. The problem is they never
3 raised this as an affirmative defense. They can't do it now.

4 Then there's the argument that Fred didn't authorize
5 a release of personal information. I don't know how many times
6 I had to write letters saying it's authorized. I mean, are
7 they questioning whether I had the authority, you know, to
8 speak for my client --

9 THE COURT: Why didn't he sign?

10 MR. COHEN: We didn't sign it because the release if
11 you look at it, it says you consent to a release of personal
12 information so that a committee could be convened to adjudicate
13 Fred's termination, and it left out suspension. We felt that
14 by signing it, we would be agreeing that he wouldn't get a
15 committee for his suspension.

16 THE COURT: So you believed that suspension is a
17 prerequisite to termination?

18 MR. COHEN: Yes, Your Honor, we do.

19 THE COURT: What's your authority for that?

20 MR. COHEN: Our authority is the contract itself.
21 It's --

22 THE COURT: Where does it say you can't terminate
23 someone unless they are suspended first?

24 MR. COHEN: Under one of the provisions either it's
25 --

1 THE COURT: You're telling me you can't terminate
2 someone if you don't suspend them first?

3 MR. COHEN: Under the plain reading of their
4 contract, yes.

5 THE COURT: Okay.

6 MR. COHEN: Again, it seems like it could be
7 ridiculous. My client didn't write the policy. They did.

8 THE COURT: I understand.

9 MR. COHEN: They subsequently -- I'm not going to go
10 into -- I am not going to argue anything. So, Your Honor,
11 those are my arguments. Any argument that there's a material
12 breach has been waived, many, many times over now, we don't
13 even think a material breach is a valid offense policy-wise
14 under this Murphy case. We don't think there was a material
15 breach. We think the disciplinary procedures read the way
16 required progressive discipline, step by step, oral warning,
17 written warning, suspension and dismissal. We think they
18 waived this affirmative defense they had an obligation to get
19 rid of Fred and the release of personal information was clearly
20 authorized. We think the motion should be denied.

21 THE COURT: All right. Thank you. Any rejoinder?

22 MS. MCGINLEY: Briefly. The case we cite for waiver
23 is Camco v. Lovejoy. That is a reported case in the Eastern
24 District of Pennsylvania from 2011, and it applies Pennsylvania
25 law. In that case an independent commissioned salesperson had

1 a dispute with the distributor over commission payments, and he
2 notified the distributor of that dispute but continued to
3 service his clients and customers under the agreement and abide
4 by the non-compete provision if only to mitigate his own
5 damages while he pursued material breach.

6 Second, courts are not H. R. departments and that's
7 why the merits of the termination are not reviewable, and also
8 the materiality argument is about Dr. Fagal's breach, not about
9 Marywood's breach. And then Marywood -- Marywood's
10 expectations were communicated in the contract. The academic
11 freedom policy states that it presupposed first respect for
12 your colleagues. The professional ethics policy states
13 explicitly --

14 THE COURT: What's your answer to his argument that
15 suspension is a prerequisite to termination?

16 MS. MCGINLEY: That's what I was reading from earlier
17 in the beginning it says or, suspension or dismissal for very
18 serious violations. It's the second paragraph of the policy.

19 THE COURT: What does it say?

20 MS. MCGINLEY: I have my notes right here. It says
21 that the university regards disciplinary action as corrective
22 and not punitive. The policy recognizes, one, personal or
23 professional problems that may be rectified by an informal
24 educational process as well as serious violations of
25 professional responsibilities implicating possible

1 recommendation for suspension or dismissal. Thank you.

2 THE COURT: Thank you. Anything else?

3 MR. COHEN: One more thing, Your Honor. Your Honor
4 was asking does suspension have to precede dismissal. And
5 under the policy, which is joint exhibit 8, there's a section
6 called dismissal. And there's just one sentence. If remedial
7 actions taken during the suspension does not sufficiently
8 resolve the issues that lead to the suspension, the university
9 may move towards dismissal of the faculty member. That's all
10 it says about dismissal.

11 THE COURT: All right. We will take about ten
12 minutes, and I will come back and tell you what I -- what I am
13 going to do, okay.

14 (A brief recess was taken.)

15 THE COURT: All right. On the motion for directed
16 verdict -- are you making this motion under --

17 MS. MCGINLEY: 52 C.

18 THE COURT: My analysis of it is this. First of all,
19 on the question of material breach, I don't think the breach
20 was material. That's my view. The -- however, we move then to
21 the question of the conduct that occurred thereafter, and in my
22 view -- you raised six or seven points, Mr. Cohen. You talk
23 about the suspension not being consistent with the progressive
24 disciplinary policy, namely , no prior warnings or opportunity
25 to -- for remedial action or monitored assistance provided for

1 in the policy.

2 In my view I don't think that's applicable given the
3 nature of the conduct that's at issue here. In addition, you
4 also argue that the vice president of academic affairs had to
5 suspend Dr. Fagal. Again, I don't find that to be a winner
6 because it appears to me a superior of Mr. Levine could have
7 superseded him in that function. You also argued there was no
8 immediate harm at the time of his suspension. And, of course,
9 there was testimony of -- from Mr. -- Professor Levine about
10 the impact this had on him. It's not just physical harm, it's
11 any kind of psychological or emotional harm. It appears to me
12 that was met in any event.

13 There's also testimony that there was reputational
14 harm to Marywood. I don't know that -- I thought there wasn't
15 an awful lot of evidence of that, but that was testimony to
16 that effect. But given all that -- in addition to those
17 things, there's this idea that the suspension has to precede
18 termination, and it would appear to me that if there's a basis
19 for termination, I don't think you have to have suspension in
20 terms of the way they interpret their own rules in a way I
21 would interpret them although you can argue that I'm not
22 supposed to interpret them given the law in Pennsylvania about
23 academic governance. So I am -- I think that's pretty much
24 subsumed. The suspension is pretty much subsumed in the
25 termination.

1 In any event, the procedures were followed, may not
2 be exactly in accordance with order and so forth, but there was
3 an effort to have an ad hoc committee. Dr. Fagal selected a
4 member as he was -- as it was provided in their rules. The
5 committee met, the committee decided unanimously including the
6 member that was appointed by him that the -- the termination
7 was appropriate, albeit after he received a letter indicating a
8 recommendation of termination or a determination that he should
9 be terminated, I don't see how else it could have been done.
10 He had an opportunity twice to have this hearing, and he choose
11 not to sign the document. I see no -- I see no -- I see no
12 rational basis for that frankly.

13 So in my view Marywood followed the rules that they
14 had in place, and they gave Dr. Fagal the process that was
15 provided for in the rules in this kind of a circumstance. So I
16 think you can say that the idea of the suspension and not
17 having had a hearing or an ad hoc committee on suspension while
18 it didn't occur at the time, it occurred later on. The only
19 argument you might have there is since -- similar or different,
20 the composition of the committee. I don't know what that
21 means, but the fact it was the same people, I don't think
22 matters because in my view termination trumps suspension
23 anyway.

24 I'm not even sure you would have been entitled to a
25 hearing on suspension at that point. A couple other things.

1 You raised the retaliation in your pretrial memo, but I didn't
2 see any evidence of that. So I am not going to address that.
3 I think I covered everything. That's essentially my basis. I
4 will give you a written memorandum of this essentially, but
5 those are the core reasons that support my decision to grant
6 this motion for judgment in favor of the defendant. Anything
7 further?

8 MR. ENGLISH: No, Your Honor.

9 MR. COHEN: No, Your Honor.

10 THE COURT: All right. Thank you. We're adjourned.

11 MR. ENGLISH: Thank you, Your Honor.

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REPORTER'S CERTIFICATE

I, Laura Boyanowski, RMR, CRR, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

Laura Boyanowski, RMR, CRR
Official Court Reporter

REPORTED BY:

LAURA BOYANOWSKI, RMR, CRR
Official Court Reporter
United States District Court
Middle District of Pennsylvania
235 N. Washington Avenue
Scranton, PA 18503

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